In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

WILLIE LEE BELL, :

Petitioner :

-vs- : NO. 76-6519

:

THE STATE OF OHIO, :

Respondent :

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

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* * * * * * *

PETITION

Willie Lee Bell, Petitioner herein, respectfully represents to the Court that he was convicted of the crime of aggravated murder, kidnapping and aggravated robbery in the Court of Common Pleas of Hamilton County, Ohio, and has been sentenced to death. His conviction and sentence were affirmed by the Court of Appeals for the First Appellate District, Hamilton County, Ohio, and the Ohio Supreme Court affirmed the conviction and sentence on December 22, 1976. Petitioner's motion for a rehearing in the Ohio Supreme Court was denied on January 14, 1977, and execution of the sentence of death was stayed pending the final disposition of the within appeal to this Court; Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Ohio affirming Petitioner's conviction and sentence.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, entered December 22, 1976, is reported at 48 Ohio St.2d 270, 358 NE2d 556, and is reproduced herein as Appendix A. The opinion of the Court of Appeals for the First Appellate District, not yet reported, is reproduced herein as Appendix B.

JURISDICTION

The final order of the Supreme Court of Ohio denying Petitioner's appeal was entered January 14, 1977. This Petition is filed within the time required, and jurisdiction of this Court is founded upon 28 USC § 1257 (3)(1970), the Petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the Ohio state statutory provisions governing the infliction of the penalty of death.

A. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fifth amendment provides:

No person . . . shall be compelled in any criminal case to be a witness against himself.

B. THE SIXTH AMENDMENT TO THE CONSTITUTION:

In pertinent part, the Sixth Amendment provides:
In all criminal prosecutions, the accused shall enjoythe right to a . . . trial, by . . jury . . . and to the Assistance of counsel for his defense.

C. THE EIGHTH AMENDMENT TO THE CONSTITUTION:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. THE OHIO AGGRAVATED MURDER STATUTES:

§ 2903.01 R.C. Aggravated Murder.

. . .

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for Murder.
(A) Whoever is convicted of aggravated murder in violation of § 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

. . . .

§ 2929.03 Imposing sentence for a capital offense:

. . . .

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in Division (A) of section 2929.04 of the revised code, . . . then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury.
(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel, the court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges *unanimously* finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the revised code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender. [Italics added]

§2929.04 Criteria for imposing death or imprisonment for a capital offense.
(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the revised code, and is proved beyond a reasonable doubt:

. . . .

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and

condition of the offender, one or more of the following is established by a preponderence of the evidence:

(1) The victim of the offense induced or facilitated it.
(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

[Irrelevant portions of the foregoing Ohio statutes have been omitted to facilitate the understanding of the statutory scheme as it involves Petitioner's situation.].

QUESTIONS PRESENTED

1. CONSTITUTIONALITY OF THE OHIO DEATH PENALTY:

Whether the imposition of the sentence of death for the crime of aggravated murder under the laws of the State of Ohio (effective January 1, 1974) violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. COERCION OF ACCUSED TO WAIVE RIGHT TO TRIAL BY JURY:

Whether the Ohio statutory scheme for the imposition of the death penalty unconstitutionally coerced Petitioner, and tends to coerce other defendants similarly situated, into waiving the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

3. RIGHT OF MINOR TO HAVE MIRANDA WARNING ADDRESSED TO PARENT OR ADULT ADVISOR PRIOR TO THE TAKING OF A STATEMENT:

Whether a confession by a juvenile 16 years of age

may be used at trial against him where, although he had been given his Miranda warnings, his parents or an adult "next friend" were not given such warnings, and he and his parents or an adult friend were not permitted to confer and to consider whether he should waive his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel, before submitting to custodial interrogation by law enforcement authorities.

On this question, two adjacent sister states, Ohio and Indiana, have reached contrary interpretations of the rights of a juvenile accused of murder under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. State v. Bell, 48 Ohio St.2d 270 [The instant case], and Lewis v. State, Ind., 288 NE2d 138.

4. VOLUNTARINESS OF CONFESSION GIVEN BY A JUVENILE WITHOUT NOTICE OF THE POSSIBILITY OF THE DEATH PENALTY, OR THAT THE JUVENILE SUSPECT MIGHT LOSE THE PROTECTION OF THE JUVENILE COURT SYSTEM.

Whether a statement given by a 16 year old suspect, with an estimated IQ of 90, and with a psychiatrically-diagnosed "moderately dimished capacity" to understand the seriousness of his predicament, is truly voluntary where neither he nor his parents had been advised prior to the interrogation that the result of his statement might be the loss of the protection of the juvenile court, and his eventual indictment, trial, conviction and electrocution as an adult.

[Argument presented with argument on Question # 3.]

STATEMENT OF THE CASE

On the evening of October 16, 1974, Petitioner, Willie Lee Bell, then 16 years of age, was a passenger in an auto driven by one Samuel Hall, then 18. Hall followed a Chevelle auto into the parking garage at the Park Lane Apartments in Cincinnati, Hamilton County, Ohio, and forced the driver, Mr. Julius Graber, into the trunk of his own car at the point of a sawed-off shotgun. Hall drove the Chevelle to his home, Petitioner following in the auto the two had been in prior to the garage incident, which auto was owned by Hall's brother. After parking his brother's auto, Hall returned to Mr. Graber's Chevelle and instructed Petitioner to drive. Following Hall's directions, Petitioner drove the auto until they passed a dark service road in Spring Grove Cemetery. At Hall's command, Petitioner backed the car up the service road.

Hall removed Mr. Graber from the trunk and marched him at gunpoint up the service road. Petitioner remained at the auto. Hall shot Mr. Graber once, grazing his cheek, and ran back to the car where he reloaded the single-shot weapon. Hall then ran back into the darkness and executed Mr. Graber by placing the barrel against the hands Mr. Graber had clasped behind his head and pulling the trigger. Petitioner did not participate in the killing, and in fact did not know that Hall intended to kill Mr. Graber when the two went up the service road.

Hall then drove himself and Petitioner to Dayton, Ohio where they spent the night. The next day Hall was arrested by

an Ohio state policeman while driving a car he had stolen at gunpoint, with the owner of the auto in the truck. Petitioner, following Hall in Mr. Graber's Chevelle, continued past the arrested Hall and returned to Cincinnati, abandoning the car in the garage of an abandoned apartment house a block from his home.

A week or so later, Petitioner accompanied Cincinnati police officers to headquarters to answer questions about Samuel Hall. At some point it became apparent that Petitioner was a suspect in the Graber slaying, and Petitioner was given his Miranda rights and made several admissions, finally agreeing to give police a recorded statement. Before he gave the statement, police called Petitioner's mother and advised her that he was to be charged in Juvenile Court in a "homicide and kidnapping," and that he was about to give a statement. Mrs. Bell was afforded the opportunity to be present, but was also told that her son did not want her present. Accordingly, she declined the "invitation." She was admittedly not advised of her son's Miranda rights, and neither Petitioner nor his mother were advised that the Juvenile Court had the power to waive jurisdiction and that he could be tried as an adult. Neither was told that the statement he was about to give could be used by the State in an attempt to secure his death in the electric chair. Ignorant of these two crucial facts, Petitioner gave a statement admitting the facts set forth herein, denying that he had seen the shotgun before Hall pulled it on Mr. Graber, and denying any intent to kill on his part and denying that he

had participated in the actual killing. The last Petitioner had seen of Mr. Graber, he had been alive and well, preceding Hall up the dark path of the service road while Petitioner remained at the car.

Charges were filed in the Juvenile Division of the Court of Common Pleas, which waived jurisdiction, and Petitioner was jointly indicted with Hall in a four count indictment charging the two with two counts of aggravated murder, and one count of kidnapping and aggravated robbery. Two specifications of aggravating circumstances were also included in the indictment.

Petitioner pleaded not guilty and not guilty by reason of insanity, and filed a motion to suppress his statement from evidence. The trial court appointed three psychiatrists to evaluate Petitioner and report to the Court regarding his present ability to assist counsel and to stand trial. Petitioner was found then to be sane on the basis of the testimony of the three psychiatrists; that while there had been considerable recent drug involvement, Petitioner had an IQ of approximately 90, and suffered from a moderately diminished capacity to understand the seriousness of his situation, he was sane enough to stand trial.

At the hearing on the motion to suppress the statement, Petitioner incorporated the testimony of the psychiatrists that he suffered from a moderately dimished capacity, and the officers admitted that Petitioner's mother was not told his Miranda rights and that neither Petitioner or his mother had been advised before the statement about the possibility of his being tried as an adult and of receiving the death penalty.

The motion to suppress was denied, and Petitioner thereupon waived his right to trial by jury, and was tried by a three judge panel in the Court of Common Pleas, which convicted him on all counts and on one specification of an aggravating circumstance. A penalty trial was set for February 3, 1975 and reports were ordered from the same three psychiatrists and from the probation department. A motion was filed attacking the constitutionality of the Ohio death penalty statutes and requesting that the specification be dropped and Petitioner sentenced to life imprisonment. Both motions were denied.

At the penalty trial, the psychiatrists stated that Petitioner's IQ had improved dramatically, and conceded that his drug-free state from his arrest to the second examination might be responsible. They admitted not considering his drug habits in determining whether Petitioner was mentally deficient.

Petitioner established at the penalty trial that he was 16 years of age when the offense was committed; that he did not intend the death of the victim and did not participate in the act of killing*; that he had an IQ of 81 when examined two years before by school officials; that the psychiatrists who testified against him had estimated his IQ at 90 shortly after the killing; that at the time of the killing, Petitioner

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* The appellate courts below held that there was sufficient evidence to permit the trier of the fact to conclude that Petitioner participated in the killing. They ignored the Ohio rule that circumstantial evidence of an element of an offense must be consistent only with guilt, State v. Kulig, 37 Ohio St.2d 157; other than Petitioner's exculpatory (as to the killing) statement, what little evidence there was was circumstantial.

was under the influence of drugs; that Petitioner had been on drugs on a daily basis for several years; and that Petitioner was emotionally unwell, to the extent that he had to be placed in a special school; his teachers testified that he was not emotionally normal or mature either by adult standards or by comparison with normal youths of his own age group, and that he was constantly on drugs. One teacher saw Petitioner after the killing but before his arrest and described him as "really burned out."

Despite the foregoing, the trial court unanimously concluded that Petitioner had failed to carry his burden to prove to a preponderence of the evidence the existence of one of the three mitigating factors which would result in a life sentence, and sentenced Petitioner to die in the electric chair. Petitioner's appeals were denied by the Court of Appeals for the First Appellate District and by the Ohio Supreme Court, which stayed execution of the sentence until the disposition of this appeal.

REASONS FOR GRANTING THE WRIT

The Ohio capital punishment statutes, perhaps as the result of a misinterpretation of Furman by the Ohio General Assembly, have been rewritten to insure the death of a greater proportion of offenders than formerly. In fact, the present system is little more than a mandatory death penalty scheme with a limited exception for offenders who are retarded mentally. The accused is given virtually no meaningful opportunity of surviving the sentencing process once he has been convicted of the offense of aggravated murder and a specification of an aggravating circumstance: his character and record are not determinative factors; there is no meaningful appellate review of the appropriateness of the sentence in comparison with others; if he is a minor, emotionally disturbed and/or his participation in the homicidal act was minor or nonexistent, such facts may not be considered; and with the elimination of mercy provisions, he cannot even beg for his life.

The Ohio statutory scheme also offends the Constitution by several prejudicial procedural provisions: the offender may be coerced into waiving a trial by jury of the issue of his guilt or innocence; he is totally deprived of that right at the penalty trial, and the Ohio statute imposes upon the accused the burden of proving one of the mitigating factors all of which are so remote in the vast majority of cases as to be rendered meaningless.

The Ohio statute coerces defendants charged with aggravated murder and other crimes into waiving their constitutional right to trial by jury of the issue of guilt by virtue of the fact that by waiving a jury at the guilt trial, an accused can guarantee that he will have to convince only one third of the trier of the fact at the penalty trial in order to escape with his life; in the absence of such waiver, he must convince 100 % of the trier of the fact at the penalty trial.

The Ohio Supreme Court decided below that the Constitution does not require that a minor's parents or adult next friend be given his Miranda warnings and an opportunity to consult with him regarding whether to waive the privilege against self-incrimination. The Supreme Court of Indiana has reached a contrary interpretation of the United States Constitution, and review is necessary to resolve the conflict between two sister states as to the meaning of the Constitution

The Ohio Supreme Court further decided that a minor's statement to police may be voluntary even though the minor and his parent or adult next friend is not advised that he can be tried as an adult, and that the death penalty is a distinct possibility. The Ohio Supreme Court thus is in conflict with the Missouri Supreme Court, which has required that a minor's confession cannot be used against him where he was not advised prior to the giving of the statement that he might be tried as an adult. Review is necessary to resolve this conflict as well.

I

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAWS OF THE STATE OF OHIO (EFFECTIVE JANUARY 1,1974) VIOLATES THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In Furman v. Georgia, 408 US 238 (1972), this Court struck down capital punishment as it was then applied by the states on the basis that the death penalty as applied violated the prohibition against cruel and unusual punishment of the Eighth Amendment to the Constitution of the United States, which prohibition had previously been applied to the states through the Fourteenth Amendment, Robinson v. California, 370 US 660.

After the decision in Furman, most state legislatures, including that of Ohio, hastened to fashion new statutory schemes for the implementation of the death penalty which would withstand constitutional challenges based on Furman. Cases proceeded to trial under the new statutes and, as they proceeded through the appellate process, death rows in state prisons filled anew as the statutes were challenged.

On July 2, 1976, this Court decided five cases construing statutory capital punishment provisions enacted by five states in response to Furman: Gregg v. Georgia, ___ US

___, 96 S.Ct. 2909; Jurek v. Texas, ___US___, 96 S.Ct. 2950; Proffitt v. Florida, ___US___, 96 S.Ct.2960; Woodson v. North Carolina, ___US___, 96 S.Ct. 2978; and Roberts v. Louisiana, ___US___, 96 S.Ct. 3001. The Court, stating that "each distinct system must be examined on an individual basis," Gregg v. Georgia, supra., 96 S.Ct. at 2935, held that capital punishment is not per se unconstitutional as cruel and unusual, upheld the death penalty under the Georgia, Florida and Texas statutes, and rejected as unconstitutional the mandatory death penalties provided by North Carolina and Louisiana.

It shall be demonstrated that the Ohio legislature, in attempting to frame a constitutional scheme for the imposition of the death penalty, to the contrary has fashioned, for all practical purposes, a mandatory death penalty statute providing only an extremely limited exemption to offenders who are severely retarded mentally. In attempting to satisfy the constitutional requirements it perceived in Furman, the Ohio legislature has created a rigid, arbitrary process which ignores the requirement for a fair and constitutional procedure "to select persons for the unique and irreversible penalty of death," Woodson, supra., 96 S.Ct. at 2983.

A. The Ohio statutory scheme for the implementation of the death penalty actually precludes meaningful use of the character and record of the offender as determinative factors in the decision of whether he shall live or die.

To meet the requirements of the Eighth and Fourteenth Amendments, a state capital sentencing system must allow the sentencing authority to consider mitigating factors of a particularized nature, Jurek, supra., 96 S.Ct. at 2956. Among mitigating factors required by the Constitution are the character and record of the offender:

> . . . we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death.

Woodson, supra., 96 S.Ct. at 2991 [Emphasis added]. In support of the conclusion that consideration of the character and record of the offender is constitutionally required, the Court stated in Woodson, also at p.2991:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

In the five cases decided on July 2, 1976, the Court analyzed the schemes in each state for presenting the sentencing authority with mitigating circumstances involving the character and record of the offender:

In Gregg v. Georgia, supra., the Court approved

the Georgia procedure which requires the sentencing authority to consider "additional evidence in extenuation, mitigation and aggravation of punishment," including prior record or lack thereof, and also "any mitigating circumstances." Ga. Code Ann. §27-2503 (Supp.1975); § 27-2534.1(b)(Supp. 1975). The Court also states with respect to the Georgia plan:

> the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses [Petitioner Bell does not]? Are there any special facts about the defendant that mitigate against imposing capital punishment (e.g. his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)? 96 S.Ct. at 2936

Ironically, the mitigating factors thus cited by the Court as being sufficiently substantial as to have a bearing on the decision making process of the sentencing authority are all applicable to Petitioner herein, and are all foreclosed to him under the Ohio plan! Petitioner had not been previously convicted of a capital offense; he was 16 years of age at the time of the offense; he was cooperative with the police, and he was under the influence of drugs, under the domination of another person, and emotionally unstable at the time of the offense.

In Jurek, the plan was approved because, although two of the three mitigating factors established by statute were crime-oriented rather than defendant-oriented, the second factor permits consideration of whatever evidence of mitigating circumstances the defense can produce, 96 S.Ct. at 2956-7.

The Florida scheme was approved in Proffitt because fully seven (as opposed to Ohio's three) mitigating factors must be considered, including several applicable to Petitioner but foreclosed under Ohio law: no significant history of prior criminal activity on the part of the offender; the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; the defendant acted under extreme duress or under the substantial domination of another person,(the latter factor conceded by the Ohio Supreme Court in our case, 48 Ohio St. 2d at 282);the capacity of the defendant to appreciate the criminality of his conduct (psychiatrists testified that Petitioner suffered from a moderately diminished capacity to comprehend the seriousness of his situation even after his indictment for a capital crime); and the age of the defendant at the time of the crime (Petitioner was 16).

In Woodson, the North Carolina mandatory death penalty was ruled unconstitutional because there were no such standards to guide the sentencing authority in deciding who is to live and who is to die, 96 S.Ct. at 2991, and in Roberts, the Louisiana mandatory death penalty was struck down because: "The Eighth Amendment which draws much of its meaning from the evolving standards of decency that mark the progress of a maturing society . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." 96 S.Ct. at 3008.

I-6

On its face, the Ohio statutory scheme for the imposition of the death penalty seems to contain some of the constitutionally required factors: the decision as to sentence is made at a bifurcated penalty trial, mitigating factors are established, proof of any of which to a preponderence mandates rejection of the death penalty in favor of life imprisonment, and the sentencing authority is directed by statute to consider the "nature and circumstances of the offense and the history, character and condition of the offender." The appearance is deceptive.

The mitigating factors, proof of which will abrogate the death penalty in any particular case are:

1. The victim of the offense induced or facilitated it.

2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

3. The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

§2929.04 (B) R.C.

It is readily apparent that the mitigating circumstances involve the determination of facts. If the sentencing authority, sitting as the trier of the facts at the penalty trial, finds that any of the three mitigating facts have been established, the offender's life is spared.

By making the penalty trial exclusively a fact-finding procedure, the Ohio legislature excluded any discretion whatsoever that the sentencing authority might exercise in determining who is to live and who is to die. Under the former law, found to be cruel and unusual, a defendant had the right to request mercy. Under the new, supposedly constitutional procedure, he is denied even the right to beg for his life. If he cannot establish the existence of any of the mitigating facts, the sentencing authority has no alternative to sentence him to death. The removal of discretion from sentencing in Ohio capital cases is not accidental. The Ohio Senate Judiciary Committee felt obliged to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and jury as much discretion as possible in the punishment determination procedure." Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV.ST.L.REV. 8,18 20 (1974).

A review of the Ohio scheme will entail the same procedure as followed in Jurek v. Texas, supra. Both states established three mitigating circumstances, few indeed compared with those established by other states and by the Model Penal Code, which suggests no fewer that eight mitigating circumstances, Model Penal Code § 210.6 (proposed Official Draft, 1962). Each circumstance must be examined to determine whether any permits the

meaningful consideration of the character and record of the offender required by this Court in Roberts; see 96 S.Ct. at 3006.

Clearly, the first mitigating circumstance, that the victim induced or facilitated the offense, will be rarely applicable. The only instance which occurs to the undersigned is in mercy killing situations. At this point, it must be recalled that Ohio is not an ordinary felony murder state; even where a murder is perpetrated during the commission of one of the enumerated felonies, before an aggravated murder conviction will stand, it must be proved beyond a reasonable doubt that the killing was purposeful. § 2903.01 (B) R.C.

Further, this type of killing is so rare that the mitigating circumstance is illusory to all but a very few offenders. Yet even in those cases, character of the accused and his prior record is neither relevant or material to the sentencing process, as prior record and character of the offender have nothing whatever to do with the determination of this mitigating circumstance: whether, in fact, the victim did actually induce or facilitate the offense; either he did or he did not. Whether the prior record and character of the offender is good or bad, it makes no difference on whether the mitigating circumstance can be established.

Consequently, the character and record of the

offender making no difference, the first mitigating factor set forth in the Ohio statute does not meet the requirements of the Constitution.

The record and character of the offender also have no relevance or materiality in detemmining whether the fact constituting the second mitigating factor exists, that the offense would not likely have occurred but for the fact that the offender was under duress, coercion, or strong provocation. This "mitigating circumstance" involves a situation existing at the time and place of the crime, and the prior record and character of the offender has nothing to do with the determination of whether at the time of the offense he was under duress, or was coerced, or was under strong provocation. One with a good prior record and character is not more likely, because of that character or record, to be susceptible to duress, coercion or provocation, than is one with a bad character and record, or vice versa. Character and record simply have nothing to do with whether or not the second mitigating circumstance has been established, and hence, are not significant or meaningful in the determination.

Finally, the third mitigating factor, that the offense was primarily the product of the offender's psychosis or mental deficiency, may be proved or disproved regardless of the prior record or character of the offender. One who is psychotic or mentally deficient may have no prior record, or an extensive history of conflict with society; he may be of good or bad

character; the two factors simply have no determinative effect upon whether the fact that the offense was the product of the offender's psychosis or mental deficiency has been proved.

In this case, one defense asserted was insanity. For all practical purposes, the rejection by the trial court of this defense also amounts to a rejection of the mitigating circumstance. As mental deficiency is not defined in the Code, the courts must struggle to interpret the meaning of that term. Obviously, from the decisions below, age is not per se determinative. Petitioner had asserted that by virtue of the fact that he was 16 years of age, he was per se mentally deficient, citing the many instances where a minor's freedom is restricted by Ohio law on the basis of minority. The fact that Petitioner was on drugs at the time of the offense, was emotionally ill, was of limited intelligence (estimated IQ of 90 a few weeks after the offense, and an 81 IQ as the result of tests two years before), was easily led and influenced by the codefendant, and that, according to three of Petitioner's teachers, he was below normal in emotional stability and considered abnormal by school authorities, either by adult standards or juvenile standards, all were rejected by the Ohio courts as proof that the offense was the result of Petitioner's psychosis or mental deficiency.

Apparently, the degree of mental deficiency lies somewhere between lunacy and Petitioner's condition as outlined above. There is no definition of mental deficiency in

Ohio's statutory scheme by which the meaning of that term may be accurately determined.

* * * * *

The Ohio statute precludes the independent"consideration of the character and record of the individual" defendant which is "a constitutionally indispensible part of the process of inflicting the penalty of death," Woodson v. North Carolina, 96 S.Ct. at 2991, and is therefore unconstitutional.

B. The Ohio statutory scheme for the imposition of the death penalty provides no meaningful appellate review of the appropriateness of the penalty in relation to other death sentences.

One of the salutory features of the Georgia death penalty statutes cited by the Court in Gregg v. Georgia, supra., is the use of the state's appellate process to review each death sentence vis-a-vis other death sentences so that in cases where the ultimate sanction is imposed its imposition is not disproportionately severe in comparison with other death sentences. The Georgia plan requires the trial judge to complete a questionnaire regarding the relevant circumstances in each capital case, so that the state Supreme Court has a meaningful basis to compare various death sentences.

While Georgia statistics were apparently unavailable, this Court cited with approval the fact that in Florida, the review by the Florida Supreme Court resulted in the reduction of the death penalty to life imprisonment in 8 of 21 cases, Proffitt v. Florida, supra.

Under the Ohio law, on the other hand, there is no meaningful appellate review of the appropriateness of the death penalty-on a case by case basis, nor even on the facts of the individual case. By contrast with the Florida experience, the Ohio Supreme Court to date has reviewed 18 cases in which the death sentence was imposed. The death sentence was upheld in 17. The eighteenth case, State v. Lockett, 49 Ohio St.2d 71, 358 NE2d 1077, was reversed on grounds not related to the imposition of the death penalty and was remanded for a new trial.

In Ohio, appellate courts have never reviewed the appropriateness of the sentence in a criminal case as long as the sentence imposed was within the limitations prescribed by statute, City of Toledo v. Reasonover, 5 Ohio St.2d 22, 213 NE2d 179. One frequently cited Ohio authority, Ohio Jurisprudence 2d, goes further and states that in Ohio, appellate courts do not have jurisdiction to review sentences which are within the statutory parameters. 4 O Jur.2d Appellate Review § 1159.

In addition, since the life or death decision at the penalty trial in a capital murder case in Ohio must be based upon a finding of fact - whether any of the mitigating factors have been established- the Ohio appellate courts are restricted under Ohio law in reviewing the death penalty by the long-standing Ohio rule that appellate courts may not disturb findings of fact by the trial courts.

The Ohio Supreme Court has held on many occasions

that findings of fact by a trial court sitting without a jury are not subject to review and neither the Ohio Supreme Court nor any other reviewing court may substitute its evidential conclusions for those of the trier of the fact. See, e.g. Feterle v. Huettner, 28 Ohio St.2d 54, 275 NE2d 340 (1971), Gillen-Crow Pharmacies, Inc. v. Mandzak, 5 Ohio St.2d 201, 215 NE2d 377 (1966).

Thus, since the Ohio Supreme Court is precluded by Ohio law and its own prior decisions from inquiring into whether the findings of fact are correct, and into the appropriateness of a sentence which is within the limits of the statute, no meaningful review on the appellate level of the appropriateness of the death sentence is possible. That every death sentence reviewed by the Ohio Supreme Court has been upheld where the conviction on which it is based has been upheld indicates that there is no meaningful review in practice as well as under the statutes and case law. As a result, the narrow and rigid strictures limiting the trier of the fact at the penalty trial are not subject to correction at the appellate level.

If there were some discretion in the process at some point, factors generally held to be important in the life-or-death decision might have a meaningful impact on that decision. As we have seen, at the trial level, the trier of the fact is extremely limited in the decision-making process. Similarly, appellate courts in Ohio are without authority to correct the sentence in light of factors which should have a determinative effect - character and record of the offender, etc. The result is a mandatory death penalty with a limited

exemption to those who are severely retarded. Such a system offends the Constitution, and cannot be permitted to continue.

C. The Ohio statutory scheme unconstitutionally chills the exercise of a basic constitutional right by coercing a defendant charged with capital murder into waiving his Sixth Amendment right to trial by jury.

Under the Ohio death penalty statutes, a defendant who insists on his right to a jury trial, upon conviction of the offense and an aggravating circumstance (or,"specification") must convince the sole trial judge of the existence of one or more of the mitigating factors, in order to avoid the death penalty. A defendant who waives a jury trial who is convicted of the offense and a specification need convince but one of the three trial judges in order to avoid a death sentence. We know of no other system in the history of Anglo-American jurisprudence where a party can win his case by convincing but one-third of the members of the trier of the fact.

The situation is similar to that in United States v. Jackson, 390 US 570 (1968), in which this Court held that 18 U.S.C. § 1201(a) impermissibly chilled the right to a jury trial because it allowed the death penalty in kidnapping cases where trial was by jury, and did not permit the death penalty where a jury was waived and trial was to the Court.

The Ohio Supreme Court agreed that any statutory

scheme which chills the right to trial by jury cannot be tolerated constitutionally, but distinguished our situation from that in Jackson because in Jackson, the defendant could guarantee avoidance of the ultimate penalty by waiving a jury trial, and under the Ohio statute, the death penalty is possible under either alternative, and may be avoided under either. "Thus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the [three-judge] panel, and not with its absolute avoidance as in Jackson." 48 Ohio St.2d at 275.

The Ohio Supreme Court stated that the situation was the same in deciding whether to have a jury determine the issue of guilt or innocence, citing the greater possibility of convincing one of twelve jurors of innocence than of convincing one of three judges of the presence of a mitigating factor. The problem with this"analogy"is that it is not analogous - by convincing one juror, a criminal defendant has not won - he has merely obtained a hung jury, and one "hung" at 11-1 for conviction at that. But by convincing one of the three judges at the penalty trial, the defendant has won - he has avoided the death penalty.

The decision whether to waive a jury in order to secure the benefit of the Ohio law providing a lesser mathematical burden at the penalty trial is not, as the Ohio courts held, made in a vacuum. In a case such as this, where there is no alibi defense, or self-defense; where an extremely damaging statement has been given, and the defense

motion to suppress that statement has already been denied, and there are indications from pretrial psychiatric reports that an insanity defense will not prevail, the compulsion to waive a jury and increase the "odds" on avoiding the death penalty is substantial. Such occurred here, and Petitioner was denied his right to a trial by jury, not only on the murder charge, but on the robbery and kidnapping charges as well.

A criminal defendant, while as the Ohio Supreme Court has suggested below has many choices to make in the course of the proceedings against him, should not have to make such a "Hobson's choice" as that forced upon him by the Ohio statutes - particularly where the stake is his very life.

D. Imposition of the death penalty against a 16 year old youth who is of low intelligence and considered socially and emotionally immature and abnormal, and who has not been proved beyond a reasonable doubt to have participated in the homicidal act for which he stands convicted is grossly disproportionate and offends contemporary standards of decency.

At the penalty trial, Petitioner established that he was 16 at the time of the offense, was then under the influence of drugs (and had been, on a daily basis, for three years previously), was placed at a school for disruptive youth and not considered normal by the school board, had an IQ of 81 two years before and his IQ was estimated

at 90 a few weeks after the crime by three court-appointed psychiatrists*, and was easily led by Hall.

The prosecution failed to prove that Petitioner had participated in the act of killing. The only evidence as to what occurred was Petitioner's statement, which denied any participation,or advanced knowledge that Hall intended to kill the victim. The state sought to establish Petitioner's participation in the act of killing by the fact that the victim's body was bruised, but the coroner indicated that the bruises could have been inflicted in any number of ways. The State further suggested that the victim necessarily had to have been held by one of the defendants while he was shot by the other, but there is nothing in the evidence to indicate that such occurred.

It is submitted that even an aider and abettor's involvement in a crime must be proved beyond a reasonable doubt, as must his criminal intent. In State v. Lockett, 49 Ohio St. 2d 48 , however, the Ohio Supreme Court by a 4-3 vote seems to have abandoned the Ohio law that even in felony murder prosecutions it is incumbent upon the State to establish the offender's purpose to kill. No such intent was proved on Petitioner's part by the State.

Under all the circumstances of this case, the imposition of the ultimate penalty upon this Petitioner is offensive to the prohibition against cruel and unusual punishment, and the

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*After conviction, Petitioner scored higher in an IQ test, but this was after he had been drug-free for four months and had had regular food and medical attention in the jail for that period.

statutory scheme whereby the death penalty can be imposed upon such a criminal defendant is repugnant to the Constitution.

E. The Ohio statutory scheme unconstitutionally places the burden of proof upon the defendant in a penalty trial after the defendant has been convicted of the offense and of a specification of an aggravating circumstance.

In Mullaney v. Wilbur, 421 US 684 (1975), this Court held that the prosecution bears the burden of proof of every element of a criminal offense, and consequently ruled that a Maine statute that required the defense to prove that a killing was done in the heat of passion in order to avoid a conviction of murder rather than manslaughter was a violation of the Due Process Clause of the Fourteenth Amentment.

Here, the Ohio statute is silent as to which party bears the burden of proving to a preponderence the existence of one of the mitigating circumstances. Yet in our case, Petitioner was required to meet the burden of proof, as is illustrated from the record [R.494]:

> JUDGE MATTHEWS: The burden is upon the defendant to prove by a preponderance of the evidence one of the mitigating circumstances.
>
> JUDGE KEEFE: O.K.

This colloquy between two-thirds of the panel indicates that, whatever the meaning of the Ohio statute, Petitioner bore the burden of proof of a mitigating circumstance in this case.

The Ohio Supreme Court has held since Petitioner's trial that the defendant does bear the burden of proof in the penalty trial following his conviction of aggravated murder and a specification, State v. Reaves and Woods, 48 Ohio St.2d 127 at 135.

It is submitted that under the Ohio scheme, where the penalty trial involves a narrow and rigid factual determination by the trier of the fact, the situation is not merely a hearing to determine sentence in the usual sense where burden of proof is not particularly important. In the usual situation, a sentencing judge will consider anything either party chooses to place before it. In Ohio capital murder cases, however, the sentencing authority must base its sentence upon specific factual determinations, and it is therefore unjust to require the defendant to prove that he should be excepted from the ultimate penalty. Justice would seem to require that the party seeking the death penalty, the State, bear the burden of proving every fact which is necessary for the imposition of that penalty.

F. The Ohio statutory scheme for the imposition of the death penalty unconstitutionally denies the accused the right to the judgment of a jury of his peers as to the correctness of the death penalty.

While this Court has not yet suggested that jury sentencing is required by the Constitution, it has not yet considered a post-Furman death penalty statute, such as Ohio's, which totally excludes the institution of the jury from the

sentencing process. While the Florida statute providing that the jury recommendation is "only" advisory was upheld in Proffitt v. Florida, supra.,the Court cited the position of the Florida Supreme Court that where the trial judge imposes the death penalty over a jury recommendation of life imprisonment "the facts suggesting a sentence of death should be so clear that virtually no reasonable person could differ," 96 S.Ct. at 2965.

Jury determinations are one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," Woodson v. North Carolina, supra. Jury participation in the process of sentencing in capital cases represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 US 97, 105 (1934). Indeed,"[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 US 183, 200 n11 (1971).

Since judges do impose the death penalty "somewhat more often" than do juries, Kalven & Zeisel, The American Jury, p.436 (1966), Ohio, in enacting the present statute, to some extent increased the statistical likelihood that an accused would not survive the sentencing process. Also, the input of a jury recommendation and the resulting cognizance by the law of the conscience of the public has been removed from the Ohio sentencing process.

The Ohio scheme provides that the death sentence

can be avoided only if one of three mitigating facts is proved. The sentencing process thus involves three factual determinations of the kind that juries have historically made. A criminal defendant is entitled to the judgment of a jury of his peers as to the facts that affect significantly the decision of whether he is to live or die.

A state may not dilute the standards by which the life or death sentence is determined by "characterizing them as factors that bear solely on punishment," Mullaney v. Wilbur, supra. In United States v. Kramer, 289 F.2d 909 (2d Cir. 1961), Judge Friendly, writing for the Second Circuit, held that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of the punishment, "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge." Id. at 921.

The Ohio statute eliminating the jury from all facets of the sentencing process thus deprives an accused in a capital case of the benefit of the insight of the jury as a reflection of the conscience of the community, and of the right to have the crucial matters of fact determining his fate to be decided by the traditional and constitutionally mandated means - a jury of his peers.

II.

PETITIONER WAS COERCED INTO WAIVING HIS RIGHT TO TRIAL BY JURY BY THE STATUTORY SCHEME FOR THE DEATH PENALTY AND HIS SIXTH AMENDMENT RIGHTS WERE THEREFORE VIOLATED.

We have argued this point previously in connection with our assault on the Ohio death penalty statute, ante pp. 27-29. We include the point here to raise the question independently of that statute, for even had Petitioner been successful at the penalty trial, and been sentenced to life imprisonment, the Ohio statute would have still coerced him into waiving his precious right to trial by jury at the trial to determine whether he was guilty, not only of aggravated murder, but of kidnapping and aggravated robbery as well.

III.

WHETHER A CONFESSION BY A JUVENILE 16 YEARS OF AGE MAY BE USED AGAINST HIM AT TRIAL WHERE HIS PARENTS OR ADULT NEXT FRIEND WERE NOT GIVEN THE MIRANDA WARNINGS NOR PERMITTED TO CONFER TO CONSIDER WHETHER TO WAIVE HIS RIGHTS BEFORE SUBMITTING TO CUSTODIAL INTERROGATION.

IV.

WHETHER A STATEMENT GIVEN BY A JUVENILE CAN BE TRULY VOLUNTARY WHERE HE AND HIS PARENTS ARE NOT ADVISED BEFORE THE STATEMENT IS GIVEN THAT HE MIGHT LOSE THE PROTECTION OF THE JUVENILE COURT, AND THAT HE MIGHT SUFFER THE DEATH PENALTY.

THE DECISION BELOW HAS CREATED A CONFLICT BETWEEN TWO ADJACENT SISTER STATES IN THE APPLICATION OF FEDERAL CONSTITUTIONAL RIGHTS CONFERRED ON THEIR CITIZENS BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Ironically, had the offense for which Petitioner may lose his life occurred fifteen or twenty miles to the west, in Indiana, his statement would not have been admitted into evidence against him, and, since other evidence against him was meager indeed, he would probably not have been convicted at all.

A. THE CONSTITUTIONAL RIGHTS INVOLVED.

Petitioner contends that the statement of a minor is inadmissible unless the Miranda warnings required before in-custodial interrogations are also given to his parents or adult "next friend" as well, and that before he waives those rights, the parents or adult friend and the minor should have an opportunity to discuss whether to waive the right to silence and counsel. Involved are the Fifth Amendment right against self-incrimination, the Sixth Amendment right to counsel, and the right to due process of law and to the equal protection of the laws guaranteed by the Fourteenth Amendment.

B. THE CONFLICTING RULINGS IN OHIO AND INDIANA.

In Lewis v. State, Ind.,288 NE2d 138, the Supreme Court of Indiana held:

> . . . a juvenile's statements or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian, or an attorney representing the juvenile as to whether or not he wishes to waive those rights. After such consultation the child may waive his rights if he so chooses provided, of course, that there are no elements of coercion, force or inducement present.

The Supreme Court of Ohio rejected this proposition totally:

> Appellant asserts . . . that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian were informed of his Miranda constitutional rights, and unless the minor was given an opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.
>
> Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in Miranda that the parents of a minor should be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement.
> 48 Ohio St.2d at 276-7

The facts of our case and those of Lewis, the Indiana case, are remarkably similar: Petitioner was 16 when interrogated, Lewis was 17; both were initially taken into custody for "questioning," rather than being charged immediately; both were interviewed for a few hours; both were advised fully of their Miranda rights; both waived those rights without having had the opportunity beforehand to consult with parents or guardians who had themselves been advised of the Miranda rights; both gave incriminating statements later used against them in a trial in which each was convicted of the highest degree of murder in his respective jurisdiction. At least the Ohio Supreme Court did not attempt to distinguish Lewis on its facts: for the purposes of this constitutional question, the

facts are identical; identical, that is except that Lewis survived the criminal process - Petitioner awaits a death sentence.

The grievous error committed by the Ohio Supreme Court below is that it assumes that there can be an "Indiana Rule" or an"Ohio Rule" in the interpretation of the United States Constitution. We take pains to note that neither state Supreme Court ruled on this question under the law or constitutional authority of that state. The Indiana opinion refers to the Fifth and Sixth Amendments to the federal Constitution. The Ohio Supreme Court refers to "Miranda constitutional rights." Thus, the disparity between the rulings cannot be explained away as legitimate interpretations by state courts of their respective state laws.

There is but one United States Constitution. There can be , if there is to be justice throughout the land, only one interpretation of the provisions of that Constitution throughout our nation. While we believe that the Indiana interpretation is correct, the decision herein by the Ohio Supreme Court has created a conflict which can be resolved only by the granting of the writ of certiorari herein. The conflict is underscored in this case by the fact that the Petitioner herein awaits electrocution for an offense which, if committed a few miles to the west, in the same nation but in a different state, would have had materially different consequences for Petitioner, due to conflicting interpretations by two states of the same document which is supreme over both

jurisdictions. The situation cannot be permitted to continue. This Court is the only proper forum in which such differing interpretations by the states of the United States Constitution can be resolved. This case affords the opportunity to resolve the conflict.

C. THE EFFECT OF THE FAILURE OF POLICE TO ADVISE PETITIONER AND HIS MOTHER OF THE POSSIBILITY OF THE LOSS OF HIS JUVENILE STATUS AND OF THE INFLICTION OF THE DEATH PENALTY.

This issue was separately presented to the Ohio appellate courts, but is presented herein as it formed part of the basis for the motion to suppress Petitioner's statement in the trial court.

The Ohio Supreme Court held that advice of the kind sought here to be required "would have been pure, and perhaps improper, speculation since appellant had not yet given his statement." We submit that once police had the statement, the possibility of death as an adult was greatly enhanced. The victim, Julius Graber,was a white, 64 year old pillar of the Cincinnati Community, the director of a Jewish home for the aged. He was kidnapped by two black youths, taken to a deserted cemetery, and executed in a brutal manner. The crime and the victim were properly the subjects of a great deal of attention in the local media. It became immediately apparent that the fullest measure of an outraged community's retribution would be visited upon anyone charged with such a crime.

Under such circumstances, that a 16 year old youth confessing to such an offense would be bound over as an adult by the Juvenile Court, indicted, tried, convicted and executed as an adult is hardly speculation, but could have been foreseen with almost mathematical precision by a veteran homicide detective. The almost casual statement to Petitioner's mother that her son was being held in a homicide and kidnapping did not provide her or her son with the necessary information which was required in the making of an intelligent, informed decision of whether to waive the right against self-incrimination.

The principal question in the mind of any suspect who is being pressed for a statement while in police custody is the benefit which will accrue by virtue of remaining silent vis-a-vis the benefit which will inure from waiving the right to silence and the giving of the statement. Had Petitioner and/or his mother been aware that his statement constituted the only evidence placing him at the scene of the crime* and that the State would almost certainly seek Petitioner's conviction and execution as an adult, taken together with the emotional problems outlined previously herein, indicate clearly that the decision to waive by Petitioner alone was not sufficiently informed or intelligent as to be considered voluntary.

In short, Petitioner and his mother were never made aware of what the police, and any lawyer worth his salt could have concluded: that a decision to give a statement

* Petitioner's fingerprint was found on the outside of Mr. Graber's auto, but that print, standing alone, could not support a conviction in the absence of evidence showing that it could only have been impressed at the scene of the crime, see United States v. Collon, 426 F.2d 939 (6 Cir.1972).

could, and might yet, cost Petitioner his life. His decision to waive his right to counsel and against self-incrimination does not approach the standard required of valid waivers of constitutional rights, the intentional relinquishment of a known right or privilege, Johnson v. Zerbst, 304 US 458 (1938). Under the circumstances of this case, no effective waiver of the right to silence was possible.

It is interesting to note that the Supreme Court of the State of Missouri has held that before the confession of a minor can be deemed voluntary the juvenile must be warned that he could be prosecuted as an adult if that is indeed a possibility, State v. McMillian, 514 SW 2d 528; see also State v. Pike, 516 SW2d 505. The Supreme Court of Nebraska, on the other hand, has rejected this position, State v. Stewart, ___NW2d___, decided February 4, 1977.

Thus, there seems to be a conflict developing as to whether a confession is valid where the juvenile suspect is not advised beforehand that the possibility exists that he may be prosecuted and punished as an adult. Such knowledge certainly is necessary as a basis for the accused to make an informed decision.

This case provides the opportunity to resolve the conflict in this area as well as in the conflict set forth in Section III ante.

C O N C L U S I O N

The within case is one in which issues of great importance other than the constitutionality of the Ohio death penalty statutes can be resolved. There are serious conflicts between the Supreme Courts of several states as to the interpretation of the United States Constitution which can be resolved by the granting of the writ herein, in addition to the question of the constitutionality of the death penalty.

This Court has not yet reviewed a state system for implementation of the death penalty where the jury is totally excluded from the sentencing process, as in Ohio. All of the features of the Florida, Georgia and Texas statutes lauded by this Court as providing against the cruel and unusual infliction of the death penalty are conspicuous by their absence from the Ohio statutes.

The Ohio death penalty statutes provide, in essence, a mandatory system with a limited exclusion for those mentally defective, and that crucial term is not defined by the statute. For the reasons stated herein, the Ohio statutes do not comport with the Constitution. Defendants charged with aggravated murder who are convicted of that offense and of a specification of an aggravating circumstance are denied a meaningful opportunity to survive the sentencing process.

Respectfully Submitted,

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APPENDIX A

Opinion of the Supreme Court of Ohio, reported at 48 Ohio St.2d 270, 358 NE2d 556

Statement of the Case.

THE STATE OF OHIO, APPELLEE, v. BELL, APPELLANT.

[Cite as State v. Bell (1976), 48 Ohio St. 2d 270.]

Criminal law—Aggravated murder—Imposition of death penalty—Waiver of jury trial—R. C. 2929.03(C)(1), (2) and (E)—Constitutionality—Mitigation hearing—Relevant factors.

1. A defendant is not coerced or impelled to waive his constitutional right to jury trial by R. C. 2929.03(C)(1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty.
2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R. C. 2929.04(B) (2) and (3) was established by a preponderance of the evidence.

(No. 76-499—Decided December 22, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 11:00 p. m., police discovered Julius Graber lying in the woods in Spring Grove Cemetery in Hamilton County critically injured from a shotgun wound to the back of his head. He was pronounced dead on arrival at the hospital.

Approximately one week thereafter, Willie Lee Bell, defendant-appellant, was arrested for the murder of Julius Graber. Samuel Hall, Bell's companion, was arrested the day after Graber's body was discovered. Bell was then a minor of 16 years of age, and Hall was an adult. Following proceedings in the Juvenile Division of the Court of Common Pleas, Bell was bound over to the Hamilton County Grand Jury and was indicted jointly with Hall on

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two counts of aggravated murder, under R. C. 2903.01, with specifications of aggravated robbery and of kidnapping pursuant to R. C. 2929.04(A)(7). Bell entered pleas of not guilty and not guilty by reason of insanity.

Bell and Hall were tried separately. The trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress any inculpatory statements, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel.

The record tends to reveal the following series of events. On October 16, 1974, Bell and Hall went to a community center in Cincinnati, following which they went to Hall's home to borrow his brother's Grand Prix Pontiac automobile. In that car, Bell and Hall proceeded to Victory Parkway, where they observed a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, and followed it to the second level of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 20-gauge "sawed-off" shotgun and accosted the Chevrolet's driver, 64-year-old Julius Graber. Graber was forced into the trunk of his own vehicle, and Hall drove that car, with Bell following in the Pontiac, and parked it near his home. Bell parked the Pontiac at Hall's home, and then drove Graber's Chevrolet toward Spring Grove Cemetery. After driving past the cemetery, Bell stopped, reversed direction, and then backed the car into a lane that went inside the cemetery premises.

At this point, Robert Pierce, Jr., a resident of an apartment building near the cemetery, had just returned from work and was sitting in the parking lot of the building listening to his car radio. Pierce observed a vehicle stopped in the cemetery with its parking lights on. He heard two car doors close, one after the other, turned his radio down to listen, and then heard a voice plead "Don't shoot me. Don't shoot me." Pierce turned his radio off, and shortly thereafter heard one shot, followed, after an interval, by a second shot. He then saw the interior light

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of the car go on, and a man enter the parked car on the passenger side and move behind the wheel. Pierce heard two car doors close, saw the interior light go off, and then watched the car leave the cemetery, without any lights. Pierce called the police, around 10:50 p. m., who subsequently discovered Graber.

Hall and Bell drove to Dayton, where they spent the night in the Graber Chevrolet. The following morning, Bell driving, they stopped at a service station to ask directions for finding work. After questioning the attendant, Bell and Hall left, but shortly returned. Hall then thrust a shotgun at the attendant, Kenneth B. Hardin, took the keys to Hardin's automobile, forced him into the trunk of his car, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman, and when Hardin pounded on the trunk lid, he was discovered and released by the officer. Hall was arrested, and the shotgun was found and removed from the car's interior. Meanwhile, Bell, who was still following, proceeded back to Cincinnati, abandoned the Chevrolet on Beatrice Avenue, and returned to his residence on Preston Avenue.

Approximately one week later, following the interrogation of Hall and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and was given his *Miranda* warnings. When the answers to preliminary questions indicated a possible connection with Hall, Bell was again given his *Miranda* warnings. Approximately one hour later, Bell was given his *Miranda* warnings a third time on a printed "Notification of Rights" form, whereupon he signed the "Waiver of Rights" portion. Bell was asked to make a recorded statement, and was advised that he could have his mother present. Although Bell indicated that he did not want his mother present, the officer called Bell's mother to tell her that her son was involved in a homicide, a kidnapping and an armed robbery, and that he was going to be charged with the offenses. An offer was made to trans-

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port her to headquarters to be with her son when he made his statement, but she declined.

A recorded statement was taken from Bell which was eventually received in evidence. It confirmed most of the above factual details, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but claimed he was not aware of the shotgun until Hall got out of the Pontiac in the parking garage to threaten Graber with it. Bell conceded driving Graber's car to the cemetery and backing into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and that it was Hall who took Graber into the bushes. Bell said he then heard a shot and Graber pleading for his life. After the first shot, according to Bell's recorded statement, Hall ran back to the vehicle to get another shotgun shell and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove Bell to Dayton where the incident with the service station attendant occurred. In his statement, Bell attributed the active part of the incident to Hall, but admitted following Hall in Graber's Chevrolet for some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found in the car Hall was driving at the time of his arrest in Dayton, and also identified a latent fingerprint from the outside window on the driver's side of the Graber car as being that of Bell's.

After Graber had been pronounced dead at the hospital, where attendants discovered that he had secreted money and other valuables in his shoes, his body was taken to the morgue. A post-mortem examination revealed that death had resulted from a wound to the rear of the head inflicted by a shotgun shell at near-contact range. Testimony established that the head and hand wounds Graber received were consistent with the theory that the fatal shot was fired while Graber's hands were clasped behind his head.

The defense offered only one witness, a Columbus police officer who had interrogated and taken several statements from Hall. The statements were not, however, offered in evidence at the trial, and the case went to the panel on the basis of the evidence presented by the prosecution.

Opinion, per P. Brown, J.

At the conclusion of trial, the panel unanimously found Bell guilty of aggravated murder as charged on the second court of the indictment, and guilty of the specification to the second count, that the aggravated murder was committed during a kidnapping. Bell was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively.

Following pre-sentence and psychiatric examination, a mitigation hearing was held pursuant to R. C. 2929.03, *et seq.* The panel found that none of the mitigating circumstances specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Bell was sentenced to 7 to 25 years on the kidnapping charge; to 7 to 25 years on the aggravated robbery charge, to run consecutively with the first sentence; and to death by electrocution on the aggravated murder charge.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert Hastings, Jr.*, and *Mr. William P. Whalen, Jr.*, for appellee.

Mr. H. Fred Hoefle and *Mr. Thomas A. Luken*, for appellant.

Paul W. Brown, J. Appellant Bell raises ten propositions of law. The first three of these assert that Ohio's statutory scheme for the imposition of the death penalty is unconstitutional. That issue was decided by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant asserts in his fourth proposition of law that

he was unconstitutionally coerced into waiving his right to trial by jury by the provisions of R. C. 2929.03(C)(1), (2) and (E) which provide that if a defendant is tried by jury and convicted, then the trier of fact at the mitigation hearing is the one trial judge who presided over the jury trial; but, if the defendant is tried by a three-judge panel following a waiver of a jury trial, then the trier of fact at the mitigation hearing is the same three-judge panel.

Appellant contends that this statutory scheme coerces defendants, and coerced him, into waiving their right to trial by jury. Before a three-judge panel can impose the death penalty, it must unanimously find that the defendant has failed to establish the existence of one or more of the mitigating circumstances enumerated in R. C. 2929.04(B). Thus, if tried before a panel, a defendant need convince only one judge out of three that such mitigation existed. If, however, a defendant elects a jury trial, he must convince the sole trial judge at the penalty proceedings that a mitigating circumstance existed. Appellant asserts that this scheme impels defendants to select trial by panel, rather than by jury, because the dread of the death sentence is an overwhelming consideration.

A statutory scheme which deliberately or unintentionally chills the right to trial by jury cannot constitutionally be tolerated. Appellant relies on *United States* v. *Jackson* (1968), 390 U. S. 570, in which the United States Supreme Court held that a federal statute had such an impermissible chilling effect because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

However, unlike the statute in *Jackson*, the death penalty is possible under the Ohio statute under both alternatives, and it may be avoided under both alternatives. Thus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the panel, and not with its absolute avoidance as in *Jackson*.

Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

As noted, this statutory scheme furnishes a choice for defendants. Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made.

Further, the Court of Appeals concluded from statistics in Hamilton County that, in actual practice, this statutory scheme does not coerce or impel a defendant to waive jury trial. We are presented with no contrary evidence. Appellant's fourth proposition of law is overruled.

Appellant asserts in his fifth proposition of law that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian were informed of his *Miranda* constitutional rights, and unless the minor was given the opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in *Miranda* that the parents of a minor shall be read his constitutional rights along with

their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. Appellant's mother was given every opportunity to be with her son, and, after declining, her presence cannot be forced by police.

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults. See *Haley* v. *Ohio* (1948), 332 U. S. 596; *In re Gault* (1967), 387 U. S. 1. Such criteria necessarily varies with certain factors as the age, emotional stability, physical condition, and mental capacity of the minor. Appellant was adjudicated competent to stand trial as an adult, and thus is not afforded as much protection as a very young or disabled child who is not as capable of intelligently waiving his rights.

We are impressed with the meticulous care with which the police approached appellant's rights. Appellant was advised of his rights three times, and, the last time, was asked whether he understood them. He indicated that he did, and signed a waiver of those rights. Appellant was informed further by the officer that he could have his mother present while making his statement, but he indicated he did not wish her present. The officer nonetheless phoned appellant's mother and informed her that her son was being held for involvement in a homicide, an armed robbery and a kidnapping, and asked further if she would like to be present when her son gave a statement. The officer offered her transportation to and from police headquarters, but she declined this offer along with the opportunity to be present at the interrogation. After being informed of this conversation, appellant again declined to have his mother present when he gave his statement.

Upon review of the record, we find that the prosecution satisfied its burden of proving that the inculpatory statement by the minor appellant was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully advised, giving due regard to

the requirement that a minor be given even more scrupulous attention to the issues of voluntariness and understanding than an adult. Appellant's fifth proposition of law is overruled.

In his sixth proposition of law, appellant asserts that a juvenile's statement is involuntary and may not be used against him if both he and his parents or guardian have not been advised that he may suffer the death penalty with the use by the prosecution of the statement, and if he and his parents or guardian have not been advised that he may lose the protection of the Juvenile Court.

We find this proposition without merit. Appellant has cited no authority from any jurisdiction that supports it. The officer related to appellant's mother all of his knowledge at that point: that appellant was being held in connection with a homicide, a kidnapping and an armed robbery. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and perhaps improper, speculation since appellant had not yet given his statement. Accordingly, the sixth proposition of law is overruled.

Appellant argues in his seventh proposition of law that one who participates in an armed robbery and a kidnapping is not guilty of aggravated murder where the other participant takes the victim out of his presence and deliberately kills him, absent evidence of the first participant's purpose to kill, or that he aided and abetted the actual slaying with the intent that the victim die.

Clearly there is ample evidence that appellant affirmatively assisted and acted to complete the murder. Appellant's denial could be reasonably disbelieved after considering all relevant circumstances, especially that Hall was arrested the next day with a would-be victim in the trunk and appellant following in another car, presumably attempting to carry out the same scheme of murder.

The foregoing evidence is sufficient to sustain a finding of guilt because, under R. C. 2923.03(A)(2) and (F), one who aids and abets another in committing an offense

is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

But, in this capital case, this proposition need not be overruled solely on the above grounds. The panel was not required to accept appellant's version of the murder. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. Thus, the gist of appellant's seventh proposition is that the conviction of aggravated murder was contrary to the manifest weight of the evidence. Upon review of the entire record, we hold that there was ample, credible evidence from which the panel could have concluded that appellant actively participated in the murder. Appellant's own statement confirms his involvement in the kidnapping and the armed robbery, and concedes further that, after he drove into the cemetery, he asked Hall what was going to be done next. The court could reasonably disbelieve, as we do, that Graber lay quietly with his hands behind his head while Hall left him alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellant's statement to police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panel's rejection of appellant's version and its conclusion that Bell either committed, or actively assisted in, the murder. The seventh proposition of law is therefore overruled.

Appellant in his eighth proposition of law contends that where the prosecutor fails to advise the defense counsel of the names, addresses and criminal records of witnesses after proper discovery requests, the trial court should not permit those witnesses to testify over objection, or, alternatively, should grant motions to strike such testimony. This proposition is not well taken. The record shows that in most instances the prosecution did not have such information, but orally communicated the information to defense counsel as it was acquired. The trial court carefully examined the possibility of prejudice to appellant, and concluded that no such prejudice existed. This proposition of law is overruled.

Appellant asserts in his ninth proposition of law that a minor is "mentally deficient" within the meaning of R. C. 2929.04(B)(3), and therefore cannot be sentenced to death after a conviction of aggravated murder with specifications. The Revised Code does not define "mental deficiency"; therefore, unless usurped by a judicial definition, the term must be accorded its common, everyday meaning, keeping in mind that the statutory language defining mitigating circumstances must be strictly construed against the state and liberally construed in favor of the accused. See R. C. 2901.04(A).

However, we do not agree that a minor is *per se* "mentally deficient" within the meaning of R. C. 2929.04(B)(3). Such an intention by the General Assembly could have easily been provided for by clear and simple language. Upon review of the statute, we do not believe the General Assembly intended that a 17-year-old defendant is conclusively "mentally deficient." The ninth proposition of law is overruled.

In his tenth proposition of law, appellant alternatively argues that even if a minor is not *per se* "mentally deficient," for purposes of R. C. 2929.04(B)(3), the circumstances of this case establish by a preponderance of the evidence that the offense was a product of his mental deficiency, and that the imposition of the death penalty was error.

In considering this proposition, we will not limit ourselves, as appellant has, to the mitigating circumstances of mental deficiency. R. C. 2929.04(B) states:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence [*sic*] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. *State* v. *Woods* (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams* v. *New York* (1949), 337 U. S. 241, 247.

We will examine each of the three mitigating circumstances provided for in R. C. 2929.04(B) to determine if the evidence established that such a mitigating factor existed.

We need not spend much time or effort, though, in discussing R. C. 2929.04(B)(1) as there was no evidence whatsoever that the victim induced or facilitated the crime.

However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04(B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04(B) states that "the death penalty • • • is precluded when, considering the nature and circumstances of the offense *and the history, character, and condition of the offender*" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.

As used in R. C. 2929.04(B)(2), the terms "duress" and "coercion" are to be construed more broadly than when used as a defense in criminal cases. See *State* v. *Woods* (1976), 48 Ohio St. 2d 127.

There was evidence in the psychiatric reports that appellant was perhaps easily led by Hall. When combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstance defined by R. C. 2929.04(B)(2). However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that appellant was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that appellant could have very easily quit the scheme while following in another car. Further, it must be remembered that appellant and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.

The third and final mitigating circumstance in the statute concerns the offender's psychosis or mental deficiency. While rejecting appellant's claim that a minor defendant is *per se* "mentally deficient," we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency. Senility, as well as minority, may well be relevant, and therefore properly considered, in determining whether the offense was a product of mental deficiency.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities and others fails to sustain appellant's position that he suffered from a mental deficiency. Appellant's situation was unpleasant but not unfamiliar: an unsatisfactory home, absence of family or other supervision, drug involvement, and inability to cope with school demands. Even when considered together with defendant's minority, all the factors do not establish a "mental deficiency" for purposes of R. C. 2929.04(B)(3). Although appellant's environment was in-

Syllabus.

deed undesirable, such conditions do not excuse or even mitigate aggravated murder. To hold otherwise would set a dangerous and misleading precedent for future defendants. We therefore agree with the panel and the court below that the aggravated murder was not the product of appellant's psychosis or mental deficiency, and therefore overrule appellant's tenth proposition of law.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

THE STATE, EX REL. THE BEACON JOURNAL PUBLISHING COMPANY, APPELLEE, *v.* ANDREWS, REGISTRAR, APPELLANT.

[Cite as State, ex rel. Beacon Journal Pub. Co., v. Andrews (1976), 48 Ohio St. 2d 283.]

Public records—Registrar's documents—Considered public records—To be kept open for public inspection—Mandamus.

1. All documents in the possession of the Registrar of Motor Vehicles, including all abstracts of records required to be received by and maintained by the registrar pursuant to the provisions of R. C. 4507.40, are public records and shall be kept open at all reasonable times for inspection and, upon request, the registrar shall make copies of such records available at cost within a reasonable period of time.
2. The records of all proceedings of the Registrar of Motor Vehicles are required to be open to the public for inspection at all reasonable times.

(No. 76-104—Decided December 22, 1976.)

APPENDIX B

Opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, not yet reported.

75068

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO, : NO. C-75068

Plaintiff-Appellee, :

vs. : O P I N I O N.

WILLIE LEE BELL, :

Defendant-Appellant. :

FILED

APR

CLERK OF COURTS

APPEAL FROM THE COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and William P. Whalen, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Thomas A. Luken, 1003, First National Bank Building, 105 East Fourth Street, Cincinnati, Ohio 45202, and H. Fred Hoefle, 400 Second National Bank Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, J.

At about 11:00 P.M. on the evening of October 16, 1974, Julius Graber was discovered by police lying in Spring Grove Cemetery in Hamilton County, Ohio, critically injured from a shotgun wound at the back of his head. He expired in the ambulance on the way to the hospital. Approximately one week thereafter, the defendant-appellant, Willie Lee Bell, then a minor of 16 years of age, was arrested together with one Samuel Hall, an adult, for the murder of Julius Graber. Following proceedings in the Juvenile Division, not here in issue, Bell was bound over to the Hamilton County Grand Jury and was jointly indicted with Hall on two counts of aggravated murder contrary to R. C. 2903.01, with specifications of aggravated robbery and of kidnapping, and on separate counts of aggravated robbery and kidnapping. Counsel was assigned the indigent Bell, and pleas of not guilty and not guilty by reason of insanity were entered.

In subsequent proceedings, the trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress an inculpatory statement, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel. Trial then ensued, separate from that of Hall, at the conclusion of which the court unanimously found Bell guilty of aggravated murder as charged in the second count of the indictment, and guilty of the specification to the second count, viz., that the aggravated murder was committed while Bell was committing kidnapping. He was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively. Following pre-sentence and psychiatric examinations, a hearing on mitigating circumstances was held by the panel pursuant to R. C. 2929.03 et seq., at the conclusion of which the panel unanimously found that none of the mitigating circumstance specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Sentence, including death by electrocution, was then pronounced and entered.

Appeal was timely filed, and counsel provided for appellant to prosecute this appeal. Nine assignments of error are presented, have been vigorously argued, and will be discussed serially infra, following a review of such of the evidence produced during the trial and antecedent proceedings as is necessary to provide a

fundament for the disposition of the various questions of law raised thereby.

The record reveals a body of evidence adduced on behalf of the State, resulting from the testimony of some 20 witnesses and including the recorded statement of Bell, which tends to establish the following series of events. Earlier in the evening of October 16th, Bell and Hall had met at a youth center in Cincinnati to thereafter leave for Hall's home, where the latter borrowed his brother's Grand Prix Pontiac. After briefly stopping at a White Castle restaurant, the two proceeded to Victory Parkway, falling in column behind a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, to follow the leading vehicle to the second floor of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 12 gauge "sawed off" shotgun and accosted the Chevrolet's driver, who proved to be Mr. Graber, the 64 year old director of the Glen Manor Home for the Aged. Graber was forced into the trunk of his own vehicle, and Hall drove their unwilling passenger, with Bell following in the Pontiac, to Dana Avenue, where the Pontiac was then parked. Bell next entered Graber's Chevrolet and began driving it in the direction of Spring Grove Cemetery. At shortly before 11:00 P.M., Bell drove past an entrance to the cemetery, stopped and reversed directions, and backed the Chevrolet up a lane inside the cemetery premises.

At this point, one Robert Pierce, a resident of an apartment building on Groesbeck Avenue, near the cemetery, had just returned from work and was sitting in the parking lot of his building in his automobile listening to the conclusion of a baseball game. Through opened windows, he observed a vehicle stopped in the cemetery with its parking lights on. He then heard two car doors close, one after another, turned his radio down to listen, and heard a voice screaming "Don't shoot me; don't shoot me." He turned his radio off, and shortly thereafter heard one shot, followed after an interval by a second shot. He then saw a man enter the parked car on the passenger side to place himself behind the wheel. He heard two car doors closing, saw the parking lights extinguished, and watched the car proceed, without lights, out of the cemetery and onto Gray Road and away. At about 11:00 P.M. this witness called the police, who shortly thereafter discovered Mr. Graber, with the results heretofore related.

After Graber had been pronounced dead at the hospital, his body was removed to the morgue, where attendants discovered that he had secreted money and other valuables in his shoes. A post-mortem examination revealed that death had resulted from a wound at the rear of the head delivered by a shotgun held at near-contact range. Numerous pellets of #5 shot were removed from the body, and testimony was received that the wounds, to hand and head, were consistent with the fatal shot having been delivered while Graber's hands were clasped behind his head.

Following the fatal incident, Hall and Bell drove to Dayton, Ohio, where they spent the night in the Graber Chevrolet. The next morning, with Bell driving, they stopped at a service station in Dayton where they made certain inquiries of the attendant, one Kenneth Hardin, about finding work. After conversation, Bell and Hall left, but returned following a short interval. Hall then thrust a shotgun at Hardin, relieved him of the keys to his auto-

mobile, forced Hardin into its trunk, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman for a defective muffler, and when Hardin pounded on the trunk lid, he was released by the officer. Hall was arrested and the shotgun removed from the vehicle's front seat. Bell, meanwhile, who still was following in the Graber Chevrolet when Hall was stopped, proceeded back to Cincinnati to abandon the Chevrolet on Beatrice Avenue (near his own residence on Preston Avenue) to which he then returned.

Approximately one week later, following the interrogation of Hall by officers of various police departments and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and, when the answers to preliminary questions indicated a possible connection with Hall, was given the first of several *Miranda* warnings. Bell was asked to make a recorded statement and instructed, in connection therewith, that he could have his mother present with him when he made any statement, if he so desired. Although Bell declined, the officer nevertheless called his mother to tell her that her son was involved in a homicide, kidnapping and robbery with Hall, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement. She declined to come to headquarters.

A statement was then taken from Bell, to eventually be received into evidence. It confirmed most of the factual details related above, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but

said he did not know of the presence of the shotgun until Hall got out of the Pontiac to threaten Graber with the weapon. He conceded driving Graber's vehicle to the cemetery and backing up into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and Hall who took him "in the bushes and I heard a shot and I heard this man crying, telling Sam, 'Don't shoot anymore.' " T. p. 340. After the first shot, according to Bell, Hall ran back to the vehicle to get another shell for the shotgun and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove the pair, according to the statement, to Dayton where the incident with the service station operator occurred. Bell attributed the active part of these proceedings to Hall, but admitted following Hall in Graber's Chevrolet while the two vehicles were driven some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found on Hall at the time of his arrest in Dayton, and identified a latent fingerprint from the outside window on the driver's side of the Graber vehicle as being that of Bell.

The defense offered only one witness, a Columbus police officer who had interrogated and had taken several statements from Hall. The statements were not, however, offered into evidence, and the case went to the panel on the basis of the evidence presented by the State.

I.

The first three assignments of error challenge the constitutional validity of the Ohio death penalty provisions, and are

phrased as follows:

> I. Imposition of the punishment of death is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, since it constitutes cruel and unusual punishment.
>
> II. The trial court erred in overruling the "Motion for an Order Declaring the Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of Aggravated Murder."
>
> III. The death penalty to which appellant was sentenced offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The first two of these concededly raise questions which are for all practical purposes identical, were therefore argued together, and will be similarly treated here. Appellant urges, under these assignments, that the Ohio death penalty provisions failed to cure the infirmities found by at least three of the Justices constituting the majority of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) to fatally infect similar legislation and that the Ohio statutory scheme for the punishment of murder contained in R. C. 2929.02 et seq., enacted effective January 1, 1974, failed to eliminate those elements of arbitrary, rare, and discriminatory application which call down the prohibitions of the Eighth and Fourteenth Amendments. Appellant points, among other things, to the continuing presence of such variable elements as grand jury discretion to indict for a capital or non-capital version of the same offense, prosecutor discretion in bringing matters to the grand jury and in plea-bargaining proceedings thereafter, discretion in the Juvenile Division in whether it elects to retain or abjure jurisdiction over a juvenile offender, judicial discretion in finding the presence or absence of aggravating

circumstances and/or mitigating circumstances under R. C. 2929.04 (A) and (B), and, finally, discretion in the exercise of executive clemency.

The third assignment of error argues the per se invalidity of the death penalty under the Eighth and Fourteenth Amendments, urging us to adopt the view that "contemporary knowledge and standards of decency" have demonstrated the "inutility" of the measure as a detriment to crime, and have manifested a more sophisticated approach to the retributive aspects of punishment, as well as a greater knowledge of the possibilities of rehabilitation. These and other factors, argues the appellant, have led to a growing reluctance to resort to this last enormous and irreversible step, a reluctance which, given the progressive non-static nature of the concept of "cruel and unusual punishment," has finally succeeded in the last half of this century in bringing that mode of punishment within the prohibition of the Amendment.

This argument, while not lacking in legal or humanitarian interest, fails on several grounds, it seems to us. First, it is difficult indeed to derive comfort from the Eighth Amendment as the source of an implied constitutional prohibition of the death penalty, when both the Fifth and Fourteenth Amendments expressly contemplate and forgive its use when accompanied by due process of law:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .nor shall any person. . . be deprived of life. . .without due process of law. . . .
>
> . . .nor shall any State deprive any person of life . . . without due process of law . . . .

To similar effect, see Sections 9 and 10, Article I of the Ohio Constitution.

Secondly, we are unable to derive any dispositive or even persuasive support for this argument from the final arbiters of all such arguably problematical constitutional language, the United States Supreme Court. In the *Furman* case, only two of the nine Justices stated unequivocal support for the proposition here advanced by appellant; the balance of the Justices either supported the constitutionality of the death penalty legislation in question, or found it lacking in detail but not necessarily in principle. Historically, of course, the appropriate use of the death penalty has judicial approbation. As Mr. Justice Douglas remarked in *Furman*:

> It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U.S. 436, 447.
>
> 408 U.S. at 241.

See also *Wilkerson v. Utah*, 99 U.S. 130, (1878); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

In sum, the arguments (and examples) offered by appellant to sustain his first three assignments of error are indistinguishable from those made to us and rejected by us in the recently decided cases of *State v. Reaves*, No. C-75022 (1st Dist., January 26, 1976) and *State v. Woods*, No. C-75047 (1st Dist., January 26, 1976), and require overruling on authority thereof. We note, in passing, the similar result reached by the Court of Appeals for Franklin County, Ohio, in *State v. Harris*, No. 74AP-580, decided June 10, 1975, and *State v. Royster, aka Shaw*, No. 75AP-195, decided August 26, 1975, both unreported, and cite with approval the language of Judge Whiteside in his concurring opinion in the *Harris* case:

> Regardless of one's personal views as to whether the death penalty should be used as punishment for crime, the only conclusion consistent with the Constitution itself is that the death penalty is not *per se* unconstitutional, and that the Legislature has the power to provide for the imposition of the death penalty so long as the means of imposition, the manner of determining when it is to be imposed, and the offenses for which it is imposed are neither discriminatory nor constitute cruel and unusual punishment. The mandatory Ohio death penalty, limited in its application to only the most serious types of aggravated murder, and predicated upon detailed factual determinations both as to guilt and mitigating circumstances, meets the constitutional test so as to neither be discriminatory nor constitute cruel and unusual punishment.

The first three assignments of error are overruled.

II.

The appellant's fourth assignment of error is phrased as follows:

> IV. Appellant was unconstitutionally coerced into waiving his right to trial by jury by the provisions of §§ 2929.03 and .04, R. C.

The argument here proceeds from the factual circumstance providing for the separation, under the Ohio statutes, of the trial to determine guilt pursuant to R. C. 2903.01 and 2929.03, from the trial to determine the penalty pursuant to R. C. 2929.03 and .04. The determination of guilt of both the offense and the specification of aggravating circumstance is by verdict of a jury unless waived in writing by the defendant, in which event it is by verdict of a three-judge panel. If a jury is not waived, the determination of penalty is made by the trial judge who presided over the jury trial. If, however, a jury is waived, the penalty is determined by the three judge panel which determined his guilt, under the following procedure:

> . . .if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.
>
> R. C. 2929.03 (E) (Emphasis added).

Thus, if the defendant succeeds in convincing only one of the three judges on the panel that one or more of the mitigating circumstances listed in R. C. 2929.04(B) has been established by a preponderance of the evidence, the defendant will escape a sentence of death, as opposed to the argued greater difficulty in so convincing a single sentencing judge. This circumstance, argues the appellant, impels him to select trial by panel rather than trial by jury; the dread of a death sentence is so overwhelming in its compulsion, argues appellant, that it carries all other considerations before it, including what would otherwise constitute a clearly favorable and generally dispositive consideration, viz., the necessity of determining guilt beyond a reasonable doubt by the unanimous verdict of twelve jurors.

Clearly, the creation of a statutory scheme which deliberately, or effectively, even where unintended, discouraged or chilled to any substantial degree the undoubted right of a citizen of this State or of the United States to trial by jury of a criminal offense of the instant magnitude, could not constitutionally be tolerated. In *United States v. Jackson*, 390 U.S. 570 (1968) relied upon by appellant, the United States Supreme Court had before it a federal statute (18 U.S.C. § 1201(A)) which it determined to have precisely such discouraging effect. There, however, the statute providing punishment for conviction of kidnapping made the death penalty possible where trial was by jury, but unavailable where trial was by the court.[1] As was appropriately pointed out by Mr. Justice Stewart, speaking for the Court:

> One fact at least is obvious from the face of the statute itself. . .the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury - and only the jury - to return a verdict of death. 390 U.S. at 572.

His waiver of trial by jury, on the other hand, and without more, spared his life. No such dramatic and compelling dichotomy is present in the statutes under review. Death is possible under either alternative, and it may be avoided under both alternatives under the Ohio statutes. Unlike *Jackson*, it is only in the arguably greater possibility of avoidance of death growing out of the requirement of unanimity within the panel, and not to its absolute avoidance, that appellant may find any comfort in R. C. 2929.03(E). Presumably, and paradoxically, appellant would find no constitutional flaw if the statute required the three judge panel to unanimously find the presence of a mitigating factor before it could avoid imposing death; but it may reasonably be doubte that this logic would in truth commend itself to the defendant anymore than it did to the General Assembly.

We do not, for these reasons, find *Jackson* to be controlling or persuasive authority for the question at issue. However, we do not wish to be understood as holding that a penalty or other statute which strongly inclined rather than actually coerced a defendant into waiving his right to a jury trial, would escape the most searching scrutiny as to constitutional rectitude. There are obviously more ways of inducing conduct than bludgeoning someone over the head; statutes may be subtly as well as patently offensive Were we, therefore, able to conclude from our reading of the statutes in question, or from our experience in dealing with them, that they were so designed, or that they so worked in practice, as to persuasively incline or induce a defendant toward a waiver of the constitutional right to trial by jury that he would otherwise be completely free to enjoy, we could follow appellant's argument with

greater ease. Such does not appear to be the case here.

First, since our attention is focused by appellant's argument upon the greater possibility of convincing one out of three judges of the existence of mitigating factors than one judge alone, it seems entirely appropriate to note that there is also a greater possibility of convincing one or more out of twelve jurors of the absence of evidence of guilt beyond a reasonable doubt, than so convincing one out of three judges of the same fact. If the first factor inclines against a jury trial, the latter inclines toward it. The balance struck by these competing considerations is one for the judgment of competent trial counsel; we find no unfair tilt toward the latter which would require us to determine that the statutes unconstitutionally chill the right to trial by jury.

Second, we are reinforced in our above analysis by actual experience with the statutes since they became effective January 1, 1974. Thus, since January 1, 1974, there have been a total of 11 indictments for aggravated murder with specifications of aggravating circumstances in Hamilton County. Of this total, 7 were set for trial by jury, and only 4 of the 11 proceeded to trial before a three judge panel pursuant to waiver of jury trial. This scarcely suggests the existence of any substantial coercion or statutory tilt toward inducing jury waivers; to the contrary, it suggests that the balance referred to, supra, is still judged to lie on the side of twelve jurors determining the issue of guilt. The fourth assignment of error is overruled.

III.

The fifth assignment of error challenges the overruling of appellant's motion to suppress his inculpatory statement and its subsequent admission into evidence. The issue raised here is not as to the timing or adequacy of the *Miranda* warnings to Bell, since they were given early, frequently, and correctly, but rather derive from what is conceived to be Bell's special status as a minor:[2]

> Appellant challenges these rulings on the ground that a minor has the constitutional right to have the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, given to his parents as well as to himself before a statement could be taken and used against him, that he had a right to consult with parents and counsel before having to decide whether to waive his *Miranda* rights, and that he had a right to be told, and for his parents to be told, that the possibility existed that the statement might be used in an effort to kill him in the electric chair. In the absence of such warnings made to such persons, and their intelligent and knowing waiver by all such parties, his statement is involuntary and inadmissible.
>
> Appellant's brief at 32.

It will be recalled that the interrogating officer who took th statement from Bell testified that he first informed him that he could have his mother present while he made his statement (T. p. 7 that he called the mother and informed her that her son was being held for involvement in a homicide, robbery, and kidnapping (T. p. 73, 74, 107), and further asked her if she would like to be prese when he gave the statement. The mother declined the offer of transportation to headquarters, declined the opportunity to be present at the interrogation, and Bell himself again declined to have his mother present when he was informed of this conversation. T. p. 73. After satisfying himself that appellant could read, and had in fact read the card waiving his *Miranda* rights, and that he understood the written and verbal recital of his constitutional rights and had no questions with respect thereto, the interrogatin officer took the statement.

We conclude from our review of the record that of the multiple events appellant would attach as conditions precedent to the receipt of incriminating statements from minors -- and without commenting or ruling on the propriety or necessity thereof -- only two may be said to have been absent in the instant case: no *Miranda* warnings were given to the mother; and no one told her that her son stood in possible jeopardy of the death penalty.[3]

Appellant concedes that neither proposition has support in Ohio authorities, and has cited to us no case from any jurisdiction lending support to the latter proposition, which we find to be without merit. Whatever duty the officer had to communicate with Bell's mother, he concededly did so before taking Bell's statement and told her that her son was being held in connection with a homicide, an armed robbery and a kidnapping. This was the sum of the officer's knowledge at that point and was fairly communicated to the mother, who nevertheless declined personal involvement in the interrogation. Any further advice by the officer as to a possible death penalty would have been the purest speculation on his part, since Bell did not actually stand in jeopardy thereof until indictment by the Grand Jury on a charge of aggravated murder with a specification of an aggravating circumstance. Moreover, we are given no reason to assume that a mother who is unmoved by the litany of heinous charges against her son, as related to her by the officer, will be moved by a recital of possible penalties, even the ultimate penalty.

We are left then with the question of whether *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny dictate that the parents of a minor shall be given a reading of constitutional rights along with their child and whether, by extension, both are then required

to intelligently and voluntarily waive those rights as a condition to the constitutional competence of inculpatory statements from the minor. We find nothing in *Miranda* which could dictate that result, although it may be conceded that when a minor is sought to be interrogated, the question of whether he knowingly and willingly waives constitutional rights cannot always be decided by the same criteria applied to mature adults. Cf. *Haley v. Ohio*, 332 U.S. 596 (1948); *In re Gault*, 387 U.S. 1 (1967). Thus, we have no quarrel with the language of the United States District Court in *United States ex rel. B. v. Shelly*, 305 F. Supp. 55 (E.D.N.Y. 1969), relied upon by appellant:

> Maturity is obviously a factor in assessing understanding, whether a confession. . .or *Miranda* rights are involved. . . . While *In Re Gault*, 387 U.S. 1 (1967). . .has not made a relinquishment of constitutional rights by a juvenile in the absence of parents or adult friends impossible, it teaches us to be cautious in finding a meaningful waiver by a lone child. Id. at 58.

Nor would we question the wisdom of Judge Weinstein's further comment in *Shelly* that:

> Where a child is involved, a period to compose himself and to obtain the assistance of a mature adviser must be granted if there is to be any assurance that he knowingly waived vital constitutional rights. . . . Id. at 59-60.

However, we can find nothing in the instant record which would violate any of these precepts. Bell was, in fact, afforded the opportunity to consult with a lawyer or with his mother, and did, in fact, have a period to compose himself while the officer consulted with his mother. There is nothing in the record of this case bearing any remote resemblance to the assault by officialdom on a "frightened and tired" child that worked the impermissible conduct in *Shelly*. Cf. *State v. White*, 494 S.W. 2d 687 (Mo. App. 1973).

Indeed, we are impressed with the meticulous care with which the police approached the rights of Bell, and which surrounded the taking of the statement, and are unable to conclude that the statement was given in other than a willing and knowing fashion by a subject who, though a minor, was both reasonably intelligent and knowledgeable, and who thoroughly understood and voluntarily and intelligently waived his constitutional rights, including any right to the presence of a mature advisor.

To the extent that *Lewis v. State*, 288 N. E. 2d 138, 142 (Ind. App. 1972) seems to hold (in addition to the criteria outlined above and found present here) that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent," we decline to follow such rule. We also note that in the *Lewis* case, unlike our own, the juvenile's mother was not contacted until after the confession was taken (although that factor would not seem to affect the broadly stated Indiana rule as quoted above). We hold, therefore, that where the State has satisfied its undoubted burden of proving that an inculpatory statement by a minor was voluntarily made pursuant to an intelligent and willing waiver of constitutional rights concerning which he was fully advised, under circumstances demonstrating due regard for the fact that the tender years of the accused require an even more scrupulous attention to the foregoing issues of voluntariness and understanding than in the case of an adult, the overruling of a motion to suppress such statement and its subsequent introduction into evidence was not error simply because the police neglected or declined to charge the mother, or other mature advisor, with the accused's *Miranda* rights.

Appellant's fifth assignment of error is overruled.

IV.

Appellant's sixth assignment of error asserts that the finding of guilt was contrary to law and to the manifest weight of the evidence, and is predicated on the argued absence of evidence that Bell participated in the actual killing of Graber, or in the planning of it. From this, appellant argues that Bell's connection with the crime of homicide was, at best, as an aider and abettor of Hall's crime, and that absent evidence that Bell advised, hired, incited, commanded, counselled, and intended the murder, he may not be convicted therefor. We disagree.

First, we do not agree that there was no credible evidence from which the court could have concluded that Bell participated in the killing. It must be conceded that Bell was intimately involved in the kidnapping and armed robbery; his own statement confirms it. Further, the evidence of Bell's own statement shows that he drove the car into the deserted cemetery and that he asked his companion: "What was we going to do now?" T. p. 340. Further, against Bell's statement that he remained in the car while his companion Hall released the victim from the trunk, took him into the woods, shot him the first time, returned to the car for another shell, reloaded the gun and then returned to shoot the pleading Graber yet a second time, we have the evidence of the witness, Pierce, who distinctly heard two car doors slam before the shots, and two car doors open after the shots. Moreover, the court was not required to believe that Graber lay supinely with his hands behind his head while his assailant left him alone to return to the

car to reload his gun. Evidence of bruises about the body of Graber the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing and in concluding that Bell either committed or, actively assisted Hall in murdering the victim.

Additionally, even if Bell's version of the slaying had been accepted by the court, i.e., that he remained in the car while Hall murdered the victim of their joint kidnapping and armed robbery venture, we do not understand the law of this State to dictate Bell's acquittal of the charge of aggravated murder. One may aid and abet the commission of a crime without being physically present when it is committed. *Browning v. State*, 21 Ohio L. Abs. 218 (1935); 15 O Jur 2d CRIMINAL LAW § 52. There is abundant credible evidence, already reviewed herein, to have permitted the triers of fact to conclude that Bell well knew the probable outcome of the encounter in the cemetery woods between his armed companion and the victim. Had simple robbery or ransom been the principal motive, the circumstances of the trio's presence in the cemetery would have been without purpose and the slaying utterly pointless; these facts could not have escaped Bell's attention. Yet -- crediting his own story -- he participated in the abduction, drove the car to the scene of the murder, sat by awaiting what he must have known would be a killing, and assisted in the escape. That evidence alone is sufficient to sustain the court's finding of guilt, for clearly, under the applicable statute, one who aids and abets another in committing an offense is guilty of the crime of complicity and may be prosecuted and punished as if he were the principal offender.

R. C. 2923.03(A)(2). It is not challenged that the charge may be stated in terms of the complicity statute, or in terms of the principal offense, as here. R. C. 2923.03(F). We hold that the court did not err in determining Bell's guilt, either as a principal in the murder, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory. Appellant's sixth assignment of error is overruled.

V.

The seventh assignment of error asks us to find prejudicial error in the refusal of the trial court to strike testimony of certain witnesses for the State whose intended presence (and/or criminal records) were not earlier made known to appellant pursuant to requests for discovery. We find this assignment of error totally without merit. In most of the instances complained of, the State was either not in possession of the information in advance of trial, or had orally transmitted it to appellant's counsel as it became available during the course of the proceedings. In each instance, the trial court made careful inquiry of possible prejudice to the appellant, and concluded that none existed. We agree. The assignment of error is overruled.

VI.

Next, appellant asserts that the finding of the panel that appellant had not met his burden of proof during the "penalty trial" as to the presence of one or more mitigating factors was contrary to the manifest weight of the evidence and contrary to law. The thrust of appellant's argument here is addressed to the third mitigating circumstance contained in R. C. 2929.04(B)(3), to wit:

> The offense was primarily the product of offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Appellant concedes that there is no suggestion of psychosis to be found in the record, but relies on the argued presence of "mental deficiency," per se. Hereunder, he is faced with the unanimous opinion of the three psychiatrists who examined him after the determination of guilt, and in connection with the penalty proceedings, that he was neither psychotic nor mentally deficient, nor that the offense was the product of either of these conditions. To the contrary, Bell was found to be "very sharp," to have an estimated I.Q. of 110-120, which would be above average, to have played chess while in jail with sufficient skill to rank as the first or second-best player there. He was, however, found to be "easily led" and "there was strong motivation to follow along with Mr. Hall." T. p. 542.

The findings of the psychiatrists after trial varied somewhat from their earlier conclusions, when they had determined Bell to be competent to stand trial. At that time, his I.Q. was determined to be about 90, he appeared subdued and "not. . .capable of much remorse." Although found to be fully in contact with reality and not suffering from "mental defect or mental illness," he was not "able to fully appreciate the gravity of the situation that he was in -- the seriousness of the overall situation." He was probably less "mature" than the average 16 year old, but fully capable of understanding the trial process and of assisting in his defense. T. p. 11-12.

This apparent lacunae, however, is filled by further examination of this record. The difference between the two findings was attributed by the psychiatrists to the improvement in living conditions brought about by being in jail over Bell's previous unconfined

experience, and particularly in the absence of hallucinogens (mescaline):

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes.

T. p. 543-44.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities, and others thus fails to sustain appellant's position. The picture one derives is unpleasant but not unfamiliar -- an unsatisfactory home, absence of familial or other supervision, involvement with drugs, inability to cope with school demands, and so on. While appellant's history is one from which the social psychologist may arguably find a degree of exculpation, it nowhere rises to the level of proof required to establish an R. C. 2929.04(B)(3) circumstance. The offense was simply not shown to be the product of mental deficiency and the panel did not err in so finding, or in finding that appellant did not meet his burden of proof during the penalty trial generally.

Appellant's eighth assignment of error is overruled.

VII.

Next, in his ninth and final assignment of error, raised by leave after submission of briefs and oral arguments, the appellant asserts that the trial court was without jurisdiction to hear the cause by reason of double jeopardy, namely, that Bell had previously been subjected to a hearing in the Juvenile Division on the identical offenses for which he was herein indicted, tried and convicted. Appellant's theory rests on the cases of *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *Brenson v. Havener*, 403 F. Supp. 221 (N.D. Ohio 1975), wherein juveniles had been adjudicated delinquents before being bound over for trial as adults on identical offenses. These cases, however, are factually inapposite to the cause before us, and the argument is not well taken.

Thus, in the instant matter, the transcript of the docket reveals that while Bell had indeed been the subject of a hearing in the juvenile division, said proceeding was the non-adjudicatory probable cause hearing prescribed by R. C. 2151.26,[4] a procedure designed to protect the juvenile, and a procedure wherein the merits are not reached. Cf. *In re Winship*, 397 U.S. 358, 367 (1970); *State v. Carmichael*, 35 Ohio St. 2d 118, cert. den. 414 U.S. 1161 (1974).

Accordingly, it is plain, and we so hold, that where a juvenile offender is subjected to no more than the statutory probable cause hearing under R. C. 2151.26 before his bind-over to the court of common pleas to be tried as an adult, and where, as here, there is no adjudication of delinquency in consequence of said probable cause determination, jeopardy does not attach and there is no impediment thereafter to the common pleas court's taking of jurisdiction. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P. J. and WHITESIDE, J., CONCUR.

WHITESIDE, J. OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

1. This statute. . .creates an offense punishable by death "if the. . .jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleas guilty. 390 U.S. at 571.

2. Bell's birth date was December 12, 1957; he was therefore two months short of 17 when the homicide occurred.

3. An additional "condition" which appellant argues, that the appellant and/or his parents must be advised that the Juvenile Division "had the power to relinquish jurisdiction and order him tried as an adult," we reject as meritless. No authority is cited in support of such proposition, and no reason for its adoption commends itself to us.

4. See Entry of November 4, 1974, *In re Willie Lee Bell*, J. C. 74-08044, Hamilton County Court of Common Pleas, Juvenile Division.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

Appendix C

C-1: Order affirming judgment of Court of Appeals, and setting new date for execution by the Ohio Supreme Court, December 22, 1976

C-2: Mandate of the Ohio Supreme Court, December 22, 1976

C-3: Order denying Petition for rehearing, January 14, 1977

C-4: Order of the Ohio Supreme Court staying execution of sentence pending review by the United States Supreme Court.

SC-S

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *City of Columbus.*

1976 TERM

To wit: December 22, 1976

The State of Ohio,
Appellee,
vs.
Willie [illegible] Bell,
Appellant.

No. 76-499

APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

This cause, here on appeal from the Court of Appeals for HAMILTON *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County.

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the ..... *appellee* ..... *recover from the* ..... *appellant* ..... *its* ..... *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* HAMILTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... *day of* ..... *19*.....

..... *Clerk*

..... *Deputy*

Baldwin Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus

19 76 TERM

To wit: December 22, 1976

The State of Ohio,
Appellee,

vs.

Willie Lee Bell,
Appellant.

No. 76-499

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion entered herein.

It is further ordered that the execution date be set for Tuesday, February 22, 1977.

THOMAS STARTZMAN,
Clerk

..... 19.....

.....

..... Deputy

RECORD OF COSTS

Docket Fee	$	*Paid by* Affidavit of Poverty
Docket Fee	$	*Paid by*
Docket Fee	$	*Paid by*
Printing Record	$	*Paid by*
Supplemental Record	$	*Paid by*
Sheriff's Costs	$	*Paid by*
Sheriff's Costs	$	*Paid by*

Baldwin Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: January 14, 1977

State of Ohio,
Appellee,

vs.

Willie Lee Bell,
Appellant.

No. 76-499

REHEARING

It is ordered by the court that rehearing in this case is denied.

FOR YOUR INFORMATION ONLY NOT FOR FILING

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th *day of* January, *19* 77

THOMAS L. STARTZMAN *Clerk.*

By ..... Deputy.

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: January 14, 1977

State of Ohio,
Appellee,

vs.

Willie Lee Bell,
Appellant.

No. 76-499

ENTRY

(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William O'Neil

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th *day of* January, 19 77

THOMAS L. STARTZMAN *Clerk.*

By .....*Deputy.*